



INDIANA COURT OF APPEALS  
ORAL ARGUMENT AT A GLANCE  
DEPAUW UNIVERSITY

**CRIMINAL LAW**

**Does a probable cause affidavit based in part upon an anonymous tip and that does not indicate that a witness identified another person as the perpetrator put forth sufficient probable cause to obtain a search warrant?**

*Donald  
Ware v.  
State of  
Indiana*

**Appeal from:**  
Marion  
Superior Court

The Honorable  
Grant  
Hawkins,  
Judge

**Oral  
Argument:**  
November 28,  
2006  
10:00 a.m. –  
10:40 a.m.  
20 minutes  
each side

**CASE SYNOPSIS**

**Facts and Procedural  
History**

In July 2005, a group of teenagers gathered to throw eggs at passing cars. Lisa Baker's car was hit, and she stopped and yelled that she was going to call the police. The boys then hit a red pickup truck, and its male driver also got out and began yelling at the boys. The man briefly stopped to talk to Baker, who was calling the police, and then drove after the boys. Shots were fired while the boys were running from the scene; one boy was shot in the leg and another was fatally shot in the back.

Police officer Tracy Nash arrived on the scene and saw a man in front of a public storage facility flashing his lights. The man exited his truck and approached Nash's vehicle, told the officer that he had been egged, and pointed him in the direction of the fleeing boys. After the officer went to look for the boys, the man left the scene.

After learning that two of

the boys had been shot, the police began an investigation to determine the unidentified man's identity. Baker picked a man out of a **photo array** (see *Glossary on page 3 for description and for descriptions of other phrases in bold*), but further investigation ruled out this man as a suspect. The police officers then received an anonymous tip that led them to suspect Donald Ware. Officer Nash picked Ware out of a photo array and officers confirmed that Ware drove a red pickup truck. The police then submitted a **probable cause affidavit** and applied for a **search warrant**, which they received. Officers conducted a search of Ware's home, and arrested Ware without an **arrest warrant**. Police read Ware his **Miranda rights**, and Ware told officers that he had been on the scene that night, but denied shooting a gun.

Before Ware's trial, the defense filed a **motion to suppress** the evidence obtained as a result of the search and arrest. The trial court denied this motion. A jury then convicted Ware of **murder**, **battery**, and two counts of **criminal recklessness**, and the trial court sentenced Ware to an

*Donald Ware v. State of Indiana***Case Synopsis (continued)**

aggregate seventy-year prison sentence. Ware is now appealing his convictions.

**Parties' Arguments**

Ware is making four arguments on appeal. Ware first argues that the affidavit did not put forth sufficient probable cause, and that therefore, all evidence obtained as a result of the search, including the statements Ware made to the police after his arrest, should have been excluded from trial. Probable cause exists when there is a sufficient factual basis to allow a reasonably prudent person to believe that evidence of a crime will be found at the premises to be searched. Ware argues that probable cause did not exist because: (1) the police should have included in the affidavit the fact of Baker's initial identification; and (2) the anonymous tip was insufficient to amount to probable cause because the police had nothing to corroborate the tip or the reliability of the informer. The State argues that both the search warrant and the arrest were supported by probable cause and that the evidence was properly admitted.

Second, Ware argues that the State presented insufficient evidence to establish that Ware was the person who fired a gun the night of the shooting. He also argues that even if the State did introduce sufficient evidence to show that he was the shooter, insufficient evidence exists to show that he had the intent to kill anyone, or that one of the boys who was not shot was a victim of criminal recklessness. The State argues

that it introduced sufficient evidence to support all the convictions. To succeed on appeal, Ware must show that there was not substantial evidence of probative value from which the jury could have found Ware guilty of the crimes.

Third, Ware argues that a shirt worn by the deceased boy on the night of the shooting was improperly admitted and prejudiced Ware's right to a fair trial. Ware argues that the State violated **discovery** rules by not telling Ware before the trial that it intended to introduce the shirt. The State argues that its failure to inform Ware of its intention to introduce the shirt was not intentional, and that the shirt's admission did not affect Ware's right to a fair trial.

Lastly, Ware asks this court to reduce his sentence. This court will adjust a sentence if it determines that the sentence is inappropriate based upon the nature of the offense and the character of the offender.

*Please see page 3 for a  
Glossary of Terms.*

## Case Synopsis (continued)

### GLOSSARY

**Arrest warrant** – an order, issued by a court upon a showing of probable cause that a person committed a criminal offense, directing authorities to arrest the person and bring him or her to court.

**Battery** – the knowing or intentional touching of another person in a rude, insolent, or angry manner.

**Criminal recklessness** – the reckless, knowing, or intentional performance of an act that creates a substantial risk of bodily injury to another person.

**Discovery** – the stage of a proceeding in which the parties learn what evidence the other plans to introduce at trial.

**Miranda rights** – certain rights possessed by all citizens – the right against self-incrimination, the right to an attorney – of which the State must inform a defendant before questioning him or her.

**Motion to suppress** – a request made by the defendant that the court not allow the State to use certain evidence against the defendant at trial, usually based on the allegation that the State obtained the evidence through some sort of illegal or unconstitutional procedure.

**Murder** – the knowing or intentional killing of another person.

**Photo array** – a collection of photographs shown to a witness to determine the identity of a person connected with a crime.

**Probable cause affidavit** – a document submitted to a judge stating facts that the police believe give them probable cause to search a place for evidence; if the judge determines that probable cause does in fact exist, the judge then issues a warrant.

**Search warrant** – an order, issued by a judge upon a showing of probable cause, allowing an officer to search a specific place and seize evidence of criminal activity.



### Opinion in this case expected:

By the end of  
Calendar Year  
2006

*The Court will  
notify Professor  
Stinebrickner  
when the opinion  
is handed down.  
Please check the  
Court's website  
to read the opin-  
ion.*

Court of Appeals  
opinions are  
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at <http://www.in.gov/judiciary/opinions/appeals.html>.

Locate archived  
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For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>

**Or contact:**

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## TODAY'S PANEL OF JUDGES

### **Hon. L. Mark Bailey (Decatur County), Presiding**

- Judge of the Court of Appeals since January 1998

**L. Mark Bailey** was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained on the Court by election in 2000. Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. He earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee. He also served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center.

Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began just prior to the Court's centennial in 2001.

**Today's oral argument is the 172nd case the Court of Appeals has heard "on the road" since early 2000.**

Among the sites for traveling oral arguments are law schools, colleges, high schools, and county courthouses.

## TODAY'S PANEL OF JUDGES

### **Hon. Margret G. Robb (Tippecanoe County)**

- Judge of the Court of Appeals since July 1998

**Margret G. Robb** was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis. Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender.

Judge Robb chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar

Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YMCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue. Their son, Douglas, a graduate of the U.S.N.A., recently embarked on his first deployment.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.





## TODAY'S PANEL OF JUDGES

### **Hon. Terry A. Crone (St. Joseph County)**

- Judge of the Court of Appeals since March 2004

**Terry A. Crone** was appointed to the Court of Appeals March 8, 2004, and currently serves as the Presiding Judge of the Third District. Judge Crone was raised in South Bend. He graduated *cum laude* from DePauw University in 1974 and from Notre Dame Law School in 1977. Judge Crone practiced law for nine years, concentrating in areas of civil practice, and served as the St. Joseph County Attorney from 1981 to 1986. In 1986, Judge Crone was appointed Magistrate of the St. Joseph Circuit Court, where he served until his appointment as Judge of the St. Joseph Circuit Court in 1989.

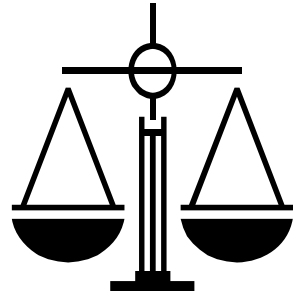
Judge Crone is a past President of the St. Joseph County Bar Association and a former member of the Board of Managers of the Indiana Judges Association, the Supreme Court Committee on

Character and Fitness, and the Alternative Dispute Resolution Committee of the Indiana Judicial Conference.

Judge Crone is currently a member of the St. Joseph County, Indianapolis, Marion County, Indiana State and American Bar Associations, the American Judicature Society, and the Phi Delta Phi Honorary Legal Society.

Judge Crone is a frequent speaker at legal education programs and currently serves as Moderator of the Indianapolis Bar Association Bar Leader Series. He helped found a program in South Bend to familiarize minority high school students with the law and related fields and was a founding member of the South Bend Commission on the Status of African-American Males and the St. Joseph County Coalition Against Drugs.

Judge Crone, who was retained on the Court by election in 2006, is married and has three daughters.



## ATTORNEYS FOR THE PARTIES

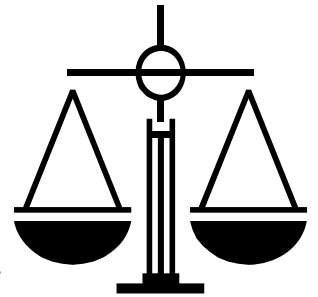
**For Appellant, Donald Ware**  
**Ann Sutton**  
**Marion County Public Defender Agency**  
**Indianapolis**

**Ann Sutton** has spent her entire legal career in public defense. In 1991, Ms. Sutton began her public service at the Public Defender of Indiana where she represented clients in post-conviction relief proceedings from hearing through appeal. Two years after joining the staff, she began representing clients in capital post-conviction cases.

Ms. Sutton joined the Marion County Public Defender Agency in January 1998 as a full-time appellate attorney, a newly- created position within the Agency. One year later, she was promoted to Appellate Administrator where she supervises six full time and thirty-five part time appellate attorneys, in addition to a four

person support staff. Ms. Sutton also maintains a partial appellate caseload. Ms. Sutton assists the Indiana Public Defender Council by organizing the Annual Appellate Practice Seminar and the appellate track for the Annual Death Penalty Seminar. She is the 2005 winner of the Indiana Public Defender Council's Gideon Award.

Ms. Sutton is from Indianapolis and graduated from Indiana State University with an Honors program degree in Political Science and minor in French. After undergrad, she took a break and lived in Connecticut for a few years, then returned to Indianapolis to attend IU-Indy law school, graduating in May of 1991. While in law school, Ms. Sutton clerked with two prominent criminal defense attorneys in Indianapolis, Richard Kammen and Robert Hammerle.



## ATTORNEYS FOR THE PARTIES

### For Appellee, State of Indiana:

**Scott Barnhart**  
**Deputy Attorney General**  
**Indianapolis**

**Scott Barnhart** was born in Evansville and grew up in Newburgh. He attended the Indiana University Kelley School of Business and received his B.S. with majors in Operations Management and Management. Following college, he spent a year working in the Americorps Service Program. As an Americorps Volunteer, his service primarily involved working with residents of a local housing authority and various educational programs for children.

Mr. Barnhart then enrolled in the University of Toledo, College of Law. While attending law school, he served as a law clerk or legal intern for the Office of the Indiana Attorney General, the Wood County (Ohio) Prosecutor, and the Ohio Sixth District Court Appeals.

Mr. Barnhart graduated with Honors from the College of Law, passed the Indiana bar exam, and accepted a position as a Deputy Attorney General in the appeals division. His primary responsibilities include non-capital appellate litigation in the Indiana Court of Appeals and the Indiana Supreme Court.

## AMICUS BRIEFS

*A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.*

- There are no amicus briefs in this case.

